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MINORITY REPORT

OF THE

COMMITTEE ON ELECTIONS

IN THE

CONTESTED ELECTION CASE

OF

THOMAS A. SPENCE,

VS.

JOHN R. FRANKLIN.

ANNAPOLIS:
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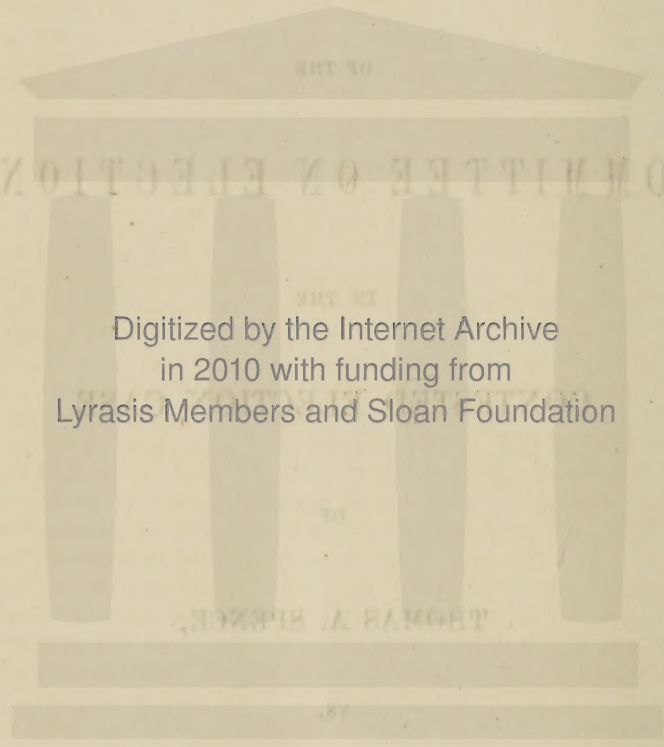
1866.



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REPORT.

The minority of the committee on Elections, respectfully ask leave of the House to submit a statement of the reasons which constrain them to dissent from the ma ority of the committee in their recommendation, that the Hon. Thomas A. Spence, should be admmitted to the office of Circuit Judge in the place of the Hon. John R. Franklin. The memoralist charges and avers that the said John R. Franklin, was ineligible to be elected, and was disqualified to hold the said office under the provisions of the fourth section of the first Article of the Constitution, and in support of this averment "he represents that the Officers of Registration of the second Election District of Worcester, in which Mr. Franklin resides, did exclude him from registration as a legal voter, and did enter of record in the said Book of Registration as their ascertainment and judgment that the said John R. Franklin was *disloyal*;" and the memoralist proceeds as follows:— "Now your petitioner respecfully insists that inasmuch as the acts which the said Officers of Registration were authorized and required to iuquire into and ascertain and declared in the fourth Section of Article first of the Constitution to be causes of disqualification, are the same, and none other than the acts which disqualify those persons who have done the same from holding any office of honor, profit or trust, under the laws of this State, and inasmuch as it has been found, ascertained and determined by a tribunal empowered and required by the Constitution, and said act to inquire and ascertain if the acts so as aforesaid, declared causes of disqualification had been done by any person appearing bofore them; that the said John R. Franklin, had done and committed the said acts or some of them, therefore your petitioner avers and charges that the said John R. Franklin was at the time of said election to wit: on the 7th of November last, and has been ever since and is now disqualified under the Constitution to hold the said office of Circuit Judge of the twelfth judicial circuit of Maryland."

The undersigned admit that a person who has committed any of the acts specified by the fourth Section of Article first of the Constitution, is declared by that instrument disqualified to hold office. But the present inquiry turns upon the point whether there is proof sufficient before this House that the incumbent has done any of those acts to enable its members acting as judges upon their oaths to find such disqualification.

Notwithstanding it was incumbent upon the contestant to prove the affirmative of the proposition he made no attempt to introduce any evidence to sustain the assertion by calling any one of the thousands of citizens of the circuit to establish what could easily have been proved, if the fact was susceptible of proof, that Mr. Franklin had really transgressed his duty as a loyal citizen in any of the particulars enumerated in the Section. It is in evidence that the incumbent has sworn that he has not offended in these respects, and the oath of no man has been produced by the contestant to contradict him. The only evidence of witnesses upon this point is that of Messrs. Richardson, Upshur, and Covington, who were examined hy Mr. Franklin.

Mr. Richardson was the gentleman whose name was found in the Registration book as having testified before the Registers against Mr. Franklin, and he was examined to ascertain what he had really said before them. He proved that he heard Mr. Franklin make a speech in 1861, as testified to by Mr. Lecompte, before the Registers, but there is no proof of the character or subject of the speech, and that he heard him in 1861, in a conversation with Mr. Wilson, argue that there was a constitutional right of secession. But he also testifies that Mr. Franklin did not claim to be a secessionist, and he has heard him claim since, that he never was a secessionist. Mr. Upshur proves that in frequent conversations with Mr. Franklin, he always heard him express himself as opposed to the doctrine and expediency of secession, and Mr. Covington testifies that in the only conversation he had with Mr. Franklin before the war, he denied the right of a State to secede.

On cross-examination, these witnesses prove that during the war they never heard Mr. Franklin rejoice at a Union victory, or lament a Confederate defeat. This is the amount of the *entire evidence* of witnesses on the point.

It leaves it doubtful whether Mr. Franklin was properly understood by Mr. Richardson as to the right of secession. But suppose the House consider the point proved, are they prepared to say that the mere avowal five years ago of the abstract right of secession is proof of present disloyalty? If so, where stand the host of men, recognized as firm loyalists

now, who in 1861 did not hesitate to avow themselves through the press and elsewhere, as convinced of its constitutionality? Nay, many men at that day, who have since been impetuous in their zeal for the triumph of the Union cause, actually contended for the expediency of the secession of the South. Without mentioning instances at hand in our own State, this House cannot forget that Mr. Greeley advocated secession at that time in its broadest terms; but it would hardly be contended that he was too disloyal to hold office in this State. That Mr. Franklin did not lay bare his thoughts to three individuals in the circuit, as to defeats or victories, is certainly the scantiest description of proof of disloyalty; and even if he, like many other good citizens in this and all other civil wars, saw cause for mourning in every clash between armies in which brothers were arrayed against each other, and preferred to forbear expressions of exultation before all he met at the sad spectacle, he only demeaned himself, as many of the truest patriots did under the same circumstances. Would any jury anywhere, upon no other testimony than this, declare on their oaths, that the person, whose acts were thus submitted for their verdict, was proved to be disloyal so as to be incapacitated to hold any office in the State? That an *impartial* jury would so decide, the undersigned cannot for a moment believe.

The *only* other evidence relied on by the contestant to support his charge of disqualification, is the action of the Registers in excluding Mr. Franklin from voting on the ground of disloyalty. We have given Judge Spence's argument in his own language, and it amounts to this; that because the Registers excluded Mr. Franklin from voting, he is therefore disqualified to hold the office of Circuit Judge. And this brings the undersigned to inquire what effect has this exclusion upon the right of Mr. Franklin to hold the office?

In our opinion, the second section of Article first of the Constitution has expressly specified the extent to which the action of the Registration officers shall be received as evidence. In that section it is said, "*which registration* shall be evidence of the qualification *of said voters to vote* at any election thereafter held," not of their qualification *to hold office*.

But the fourth section of Article first, was in no respect to be operative, even as to the right of a party *to vote* until the Legislature should pass a law to carry this provision of the Constitution into effect. Section second declares that "no person shall be excluded from voting until the Legislature shall have passed such a law and the same shall have been carried into effect." And by section fourth, of Article third, the General Assembly is directed to pass registration laws for the preservation of the purity of elections, &c., "and to *make*

effective this provision of the Constitution disfranchising certain persons or disqualifying them from holding office." Although the Legislature has passed a Registration Law, it has as yet passed no law to carry into effect the provision of the Constitution *disqualifying certain persons from holding office*, and it is settled law in Maryland that such a provision in the Constitution is of no force until the Legislature shall have passed the law which they are directed to enact. This position is clearly established by the decision in the case of Bandel vs. Isaac, 13 Md. Rep., 231. At the adoption of the Constitution of 1850, the legal rate of interest was 6 per cent. That Constitution forbade the Legislature to increase it, and declared "that the Legislature should provide by law all necessary forfeitures and penalties against usury." It was insisted that this action itself worked a forfeiture of all usurious contracts, although the Legislature had passed no law on the subject because it was a constitutional declaration that such contracts were discountenanced by the organic law. But the Court of Appeals decided that the Constitution in this respect did not execute itself and that until a law should be passed by the Legislature forfeiting such contracts they remained valid except as to the excess of interest. In the same way we are satisfied in this case, that in the absence of an act of Assembly declaring how such disqualification shall be ascertained and fixed, the latter member of the concluding sentence of section 41, of Article 3, is as inoperative as the first member of the section would have been, had not the Registration law been passed.

But other sections of the Constitution demonstrate this still further. By section 8, Article 1, all persons then in office under former elections or appointments are required to take the new oaths of office, and by section 6, Article 12, all such officers are to continue to hold their offices for the residue of their terms. There is nothing said here as to whether the persons thus serving out their full terms of service shall be *registered voters* or not, and it is not improbable that among such officers may be some who have not been registered. Are they therefore disqualified in the face of the positive direction of the Constitution, that they shall continue to serve? And are all the judgments or other official acts of such persons since the adoption of the Constitution void?

This House may well pause before they can make such a decision, which might render nugatory laws, disturb titles and unseat possessions throughout the State.

But the expression in a law of a purpose with regard to one class of objects is uniformly regarded as an exclusion of such purpose with reference to all others. Sections 6 and 8

of Act 1, expressly declare that the persons committing the offences thereby forbidden, shall upon commission be declared incapable of holding office—and this without any direction to the General Assembly to pass a law for that purpose. If the constitution had intended to disqualify at once the persons who should do the acts forbidden in section 4, without the necessity of any previous action by the Legislature; why *did it not* use language like that used in section 3, 6 and 8, and why did it give the unnecessary direction to the Legislature in section 4 1 and Act 3?

If we pass from the constitution to the examination of the Registration Act, chapter 174, of 1865, we find reiterated proofs that the Legislature did not intend that the finding of the Registers should be conclusive upon any subject except that of the right to vote, against the voter himself. The title is an Act relating to the "Registration of the voters of the State," and it says nothing of the *disqualification of office-holders*. Act 3, section 28, declares that, "every law enacted by the General Assembly shall embrace but one subject, and that shall be described in the title." And the court of Appeals in seventh Maryland Reports, page 160, State *vs.* Davis, have decided, in reference to the same words in the constitution of 1850, that although the introduction of a single foreign or irrelevant subject into a law when such subject was not included by the title would not render void the whole of a law otherwise constitutional, yet, "in such a case the matter would be rejected as void, while the principal subject of the law would be supported, if properly described in the title." If therefore this Act did attempt to disqualify persons from holding office who thus were found to be disloyal, such attempted disqualification would be void, as irrelevant and inconsistent with the title of the Act; but the law makes no such attempt. Without consuming time in examining every portion of the Act, we affirm that each section plainly shows that the men who passed the law never intended to do more by it than to exclude the unregistered *from voting*. Every member of the House knows that no such purpose was entertained by him when the law was passed at the last session, and that the Legislature supposed they had s ufficiently provided against the introduction of disloyal persons into office by the rigid provisions with which they had surrounded the right to vote.

The argument of the contestant would lead to most remarkable results. If the entry of "disloyal" in the seventh column of the Registry of voters is conclusive evidence that the person is disloyal for purposes besides voting, *as for holding office*—then the other entries in that column must also be

conclusive evidence upon the subjects to which they relate in other enquiries. Therefore upon an indictment for murder against a person who has been entered *non compos mentis* in the Registry, he would be allowed to acquit himself by the mere production of the Registry, as conclusive evidence against "all the world," that the question of his sanity had then been adjudicated, or the same Registry would be conclusive evidence of the same matter upon an inquisition *de lunatico inquirendo*, or the entry of bribery, or infamy, or alienage, or non-age would be equally conclusive upon those points respectively in any other form of enquiry. That such would be the inevitable result of the argument must be clear to any one who will consider it attentively, and that such a position can be sustained is impossible.

If a man were attempting to establish insanity as a defence, the Registry might be admitted as evidence tending to prove that in a certain investigation he had been considered *non compos* by certain persons; but this would be the utmost stretch to which the doctrine could be carried; and as a fact on the question of sanity, it would have not a particle of effect beyond the intrinsic value of the evidence produced before the Registers on the examination which induced them to make the entry. If it were shown that very slight evidence had been produced before them on the occasion, the co u jury would not consider the entry in the Registry as entitled to any degree of weight. If on the other hand it were shown that a regular inquisition against the party had been exhibited to the Registers, that inquisition when *again brought before* the *court or jury*, would undoubtedly weigh with them; but it would be the inquisition upon which the entry was founded and not the *entry of the Registers* which would be considered as having effect. The principle of law which makes a record of a competent tribunal evidence *between the same parties and upon the same questions* raised in that record, would exclude the registry as evidence upon the question of *qualification for office*. The question before the Registers was as to the right of the party *to vote*. In this case the enquiry is as to the *right to hold office*. The parties to the examination before the Registers were Judge Franklin and the Registers — here they are Judge Spence and Judge Franklin. The test of a person having been a party to the record is said to be whether he had a right to cross-examine on the former examination; but Judge Spence had no right to interfere by way of cross-examination when Judge Franklin was before the Register. We cannot think therefore, that upon any principle known to the law, the judgment of the Registers upon the right of Judge Franklin to vote can be considered as evidence entitled to any weight upon the present inquiry.

As a general principle it is not true that the right to vote and the right to hold office are co-relative. Numbers of persons hold office in this country who have no right to vote—as women, aliens and minors—and numbers have the right to vote for certain offices who are not eligible to fill them. Thus all voters can cast their ballots for Governor, Judges, &c., but only those who have attained a certain age are eligible to be elected to them. There are numbers of persons holding offices under the Constitution and Laws of Maryland who are neither voters nor residents of the State—as commissioners to take acknowledgments and State agents residing abroad.

Again, if the fact of a person not being registered is considered evidence that he is not qualified to hold office, the fact of his being registered must be equally conclusive evidence that he *is* qualified, and it would result that if the bitterest rebel had by some management procured himself to be registered, he must be admitted as qualified to hold office, notwithstanding evidence of notoriously disloyal acts should be brought to the knowledge of the House. We look in vain for any sufficient evidence in the facts accompanying the action of the Registers, to induce the House of Delegates to declare Judge Franklin disqualified, from disloyalty, to hold the office of Circuit Judge. Testimony of so trivial a character as that produced before the Registers, going only to the extent that he had been heard, early in 1861, to argue in conversation, in favor of the constitutional right of a State to secede, and that he had made a speech at Snow Hill in that year, the subject and purport of which is not given, can scarcely be esteemed sufficient to work a disqualification to office, and yet this is every word in the proof as to the testimony before the Registers, from which the House are to judge of the propriety of their action. But the other evidence shows that Mr. Franklin always claimed to be a Union man, and that he denied the constitutionality of secession. If there are none in this House who, in the inception of our troubles, transgressed to a greater extent from the present status of loyalty, its members are far beyond the average of the loyal men of the State

The next objection to the due election of Judge Franklin is based upon the alleged misconduct of the Judges of Election in four election districts of Somerset county. It is admitted that in those districts a number of persons whose names were not on the Registry, were admitted to vote, and that if they had not been so admitted, the majority in the whole circuit would have been for Judge Spence.

In defence of this course of the Judges of Election, it is alleged that there were such irregularities and wrongs in the action of the Registers in those districts, that the Registry

Law was not legally carried into effect, and that therefore the Judges were justified in governing themselves by the former poll-book, in accordance with the provision of section 2, of article 1, of the Constitution, which declares that "no person shall be excluded from voting at any election, on account of not being registered, until the General Assembly shall have passed an Act of Registration, *and the same shall have been carried into effect.*"

The contestant on the other hand, insists that the action of the Registers is absolutely binding upon the Judges, and cannot be inquired into by this House.

In our opinion, the action of the Registers is absolutely binding *against each individual*, touching *his right to vote*, and for no other purpose, but is not binding upon the public, as to the right of voting, to such extent that this House, which is the grand inquest of the State, cannot review their conduct..

If this were not so, this House could not inquire into or censure the action of the Registers in any district, though it were shown by conclusive proof that the list contained only the names of negroes or minors or aliens; or that the Registers took no oath of office, or were bribed, or registered none but notorious rebels, or gave no notices of their meeting and neglected every direction of the law that created them. Such a construction would give to these officers the most absolute power over the entire population of the State. If this be so, then the bare naming of registers would be equivalent to the "carrying the law into effect," spoken of in the constitution, and the Registers are at liberty to trifle with the law and contemn its provisions in any way they might see fit, without impairing their work.

Such is not the case in regard to any other special jurisdiction committed to a particular tribunal. The law with respect to such special appointments, is perfectly settled in innumerable cases, viz: That the authority of the persons to act must plainly be set forth on the face of their proceedings, and that those proceedings are a nullity, unless they appear to have been strictly in conformity with the power entrusted to them.

In 10, Gill and Johnson, 292, Owings vs Worthington, Judge Dorsey said, "The powers vested in the Levy Court or Commissioners by the Act, 1834, is a delegation of special authority, and *the proceedings under it must display the authority by which they are had, and be in conformity thereto, or they are coran non judice and void.*"

In 1, Gill, 380, Boarman vs Israel, the Court say "where a special limited jurisdiction, distinct from and not embraced by its general jurisdiction, is conferred by act of assembly on any tribunal, its power to act, as it has done, *must appear*

upon the face of its proceedings, and when these proceedings are brought up for review in this court, it must appear from their inspection, that every thing has been done which the law required as the basis of the authority that has been exercised." See also, 3, Gill, 498.

And such is the unquestionable tenor of the authorities. The mere fact that a party is disfranchised is not enough, says Lord Mansfield, in Stemmers vs Regem 1, Cowper, 502. The word disfranchisement "signifies taking a franchise from a man for some *reasonable* cause."

The Judges of Election in those districts, according to the election laws of the State, met at their polling places on the morning of the election. They proceeded as required by law, Code, vol. 1, p. 259, to take an oath that they would permit all persons to vote offering to poll, who, *in their judgment*, shall, according to the directions contained in the Constitution and laws, be entitled to poll, and should execute their office in all things *according to the best of their knowledge*. This law was re-enacted with respect to the votes of soldiers by the very Legislature that passed the Registration Act. By section 2, of article 1, of the Constitution, the Judges saw that no voter was to be excluded from voting at any election until a Registration Law shall have been passed and carried into effect. They saw, by section 1, of the Act of 1865, chapter 174, that the officers of Registration were required to register the names of the voters only "*in the manner therin prescribed*," and they were therefore forced by their oaths to decide for themselves whether the Registration Law *had been carried into effect*. If no list had been made or returned by the Registers, it will not be denied that the Judges ought to have admitted all legal voters to poll, for certainly in that case the law could not properly be said to have been carried into effect.

Could the Judges notice no irregularities short of an entire failure to attempt to execute the law? Would they be bound to observe a list crowded with errors and uncertainties, and bearing on its face no greater evidence of a desire to carry out the law honestly than would be manifested by a total failure to execute it? The list given by the Registers to the Judges was required to be given to them "at or before nine o'clock on the morning of the election." (Section 11, 1866, chap. 174.) But in the Fifth district it was not delivered to the Judges until some time after the polls were opened, and was acknowledged to be defective by one of the Registers. (See testimony of Littleton Polk, p. 36, *et seq.*) In fact the Registers could not truthfully have stated a compliance on their part with the provisions of the Act, for in some districts they did not meet on all the requisite days, as

required by section nine, or on other days in lieu thereof (See testimony of L. T. Polk, p. 43; of T. D. Jones, p. 72; A. Hayman, p. 178.)

In others they did not close the lists on the day require by law, but kept them open and altered them up to the Monday night preceding the election, in opposition to section eleven. (See testimony of I. J. Moore, p. 164, and W. S. Moore, p. 168.)

In others they did not swear witnesses to prove disloyalty, but made the entries without evidence, although clearly required to examine evidence by the plain provisions of the 6th section of the law. (See the *testimony passin* and the books of Registration.

One of them made an improper offer to register a voter if he would vote the Republican ticket, and others they repeatedly refused to register upon the ground that they belonged to the opposite party. (L. I. Harris, p. 188.)

(See evidence of Clement M. Wright, p. 111; R. Langsdale, p. 120; J. Evans, p. 113; H. J. Johnson, p. 161; B. A. Wright, p. 116; L. I. Harris, p. 188.)

In other cases they refused to allow persons to take the preliminary oath positively required by section 5, (See evidence of Robert Disker on page 8; of Benjamin W. Truit, p. 88.

In some districts, the proper notices were not given as required by section 9.

See evidence of C. W. Fontaine, as to fifth district, p. 32.

They did not make the proper entries or in the proper way in the books of registration, as positively required by section 5, of the Registration Act. The registration books, show that entries are frequently made in the seventh column, not recognized by the law.

That voters are frequently disfranchised without the assignment of any reason, and that almost every form of error and omission is displayed throughout the lists.

Unless all the rules as to the execution of special powers, are to be set at naught in the performance of this most important function, "the fair copy," of the corrected register, which was to be delivered to the judges of election, should have shown on its face that it was the work of duly appointed, and qualified officers who had given the notices, met at the time, administered the oaths and made the inquiries prescribed by the act under which they acted. If the Registers had been commissioners to lay off a road or condemn an alley in a village, their return would have been a nullity, unless it had shown on its face the regularity of their action. Can less particularity be required in so all important a matter, as the decision upon the sacred right of suffrage? And would not judges of election be justified in refusing under

their oaths, to be bound by lists, totally deficient in every necessary formality?

In the opinion of the undersigned, it seems clear from what we have stated, that the Registration act was not carried into effect by the Registers in these districts according to its plain requirements. We are not therefore surprised that the judges of election arrived at the same conclusion.

And as this House is the final judge of the election of the persons voted for, should they not express their disapproval of such negligence and misfeasance, by sustaining the conduct of the judges in their work.

Unless this House is resolved to sanction these errors, Mr. Franklin must be considered as duly elected, according to the returns of the judges of the district, in conformity with which he now holds his commission from the Governor.

But if the House should decide that Judge Spence is at liberty to attack the returns of the judges, though Judge Franklin cannot impeach the action of the Registers, w cannot agree the House can possibly decide with justice that Judge Spence is elected.

It is laid down as the law that where the electors *knew, or must be presumed to know* of the ineligibility of a candidate, they must be supposed to have thrown away their votes, and the next highest eligible candidate is elected.

But what could the electors have known as to Judge Franklin's ineligibility? Only that he was not registered; and this could only have been known in the district in which he lived. But we have shown that the mere fact of not being registered, is no evidence of disqualification for office. Even the voters of that district, therefore, knew nothing showing his ineligibility at the time of his election. In the other districts there could have been no knowledge even, that he was not registered, and of course the voters cannot, therefore, be supposed to have thrown away their votes.

But further, in this case according to the contestant's theory, the election was void in four districts of Somerset county. The constitution requires that the Judge shall receive a majority of the votes throughout the *whole* circuit, and therefore if the election in part of the circuit is declared void, that held in the *residue* of the circuit cannot elect the Judge. For if the right be conceded to reject *one* district of a circuit, the same principle would authorize a dominant party to reject all the districts *except one*. Such a course would be merely a repetition of what is known in the earlier history of the State, as the Allegany fraud, which was accomplished by rejecting the vote of several districts of that county, and allowing the vote of the remaining districts to be counted.

If the election in part of Somerset county was void, then the whole election is void, and it must be had *de novo*.

The undersigned accordingly report the following resolution:

Resolved, That John R. Franklin was duly elected Judge of the 12th Judicial Circuit of Maryland, in November, 1865, and is entitled to retain said office.

R. B. B. CHEW.
JOHN H. HODSON.